UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WATCO TRANSLOADING, LLC	
and	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO (LOCAL) USW 10-1	Cases 04-CA-136562 04-CA-137372 04-CA-138060 04-CA-141264 and 04-CA-141614
DENNIS ROSCOE, an Individual	Case 04-CA-138265

GENERAL COUNSEL'S REPLY BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

On April 5, 2017, the Administrative Law Judge ("ALJ") issued a decision in this case. The General Counsel filed cross-exceptions to the ALJ's decision on June 14, 2017, to which Watco Transloading, LLC ("Respondent") filed an answering brief on June 28, 2017. As permitted by the Board's Rules and Regulations, 29 CFR § 102.46(e), the General Counsel now files this reply brief to address matters raised in Respondent's answering brief.[1]

The General Counsel filed a cross-exception to the ALJ's failure to conclude that Respondent violated the Act by prohibiting its employee from discussing a disciplinary interview. Respondent makes an untimely challenge to the ALJ's findings of fact regarding this allegation for the first time in its answering brief. In addition, Respondent misstates the legal standard the Board uses to evaluate restrictions on employees discussing investigations and

[1] In addition to the General Counsel's cross-exceptions, which are the concern of the present brief, Respondent filed exceptions to the ALJ's decision and a supporting brief on May 17, 2017. The General Counsel filed an answering brief to Respondent's exceptions on June 14, 2017, as did a charging party in this case, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (Local) USW 10-1. Respondent filed a reply brief in support of its exceptions on June 28, 2017.

mischaracterizes the record in an attempt to downplay the severity of the prohibition Respondent imposed. Respondent also asks the Board to reverse its precedent with regard to such restrictions in favor of a new standard under which Respondent's conduct would still be unlawful.

Furthermore, contrary to Respondent's assertion, additional remedies would be warranted if the Board concluded that Respondent unlawfully interrogated employees. Finally, notwithstanding Respondent's assurances about its understanding of the ALJ's recommended order, clarifying the order would eliminate any risk of controversy as to the order's scope.

I. Respondent's Prohibition on Its Employee Discussing a Disciplinary Interview

A. Respondent's Challenge to the ALJ's Findings of Fact Is Untimely

In its answering brief, Respondent, for the first time, challenges the ALJ's findings of fact relating to the allegation that Respondent violated the Act by forbidding its employee from discussing a disciplinary interview with anyone (Ans. Br. at 2-3).[2] The ALJ credited employee John D. Peters's testimony over People Services Manager Brooke Beasley's testimony regarding what Beasley said to Peters during a telephonic disciplinary interview on August 5, 2014 (ALJD at 6). According to Peters's credited testimony, Beasley "said that [Peters] was absolutely forbidden to discuss any of this conversation with anyone" (Tr. at 167). Respondent now "disputes any contention that Beasley 'prohibited' anyone from speaking to others about the investigation" (Ans. Br. at 2). Instead, Respondent asserts that Beasley gave "quite credibl[e]" testimony as to the contents of the interview (Ans. Br. at 2-5). However, because no exceptions or cross-exceptions were filed to the ALJ's factual findings as to this interview, Respondent may not challenge those findings now.

[2] Citations to Respondent's answering brief will appear as "Ans. Br. at" followed by the relevant page number. In addition, citations to the ALJ's decision will appear as "ALJD at" followed by the relevant page number. Finally, citations to the transcript of the hearing will appear as "Tr. at" followed by the relevant page number.

Respondent filed no exceptions to the ALJ's decision to credit Peters over Beasley on this point. Although the General Counsel did file a cross-exception to the ALJ's legal conclusion that the "absolut[e]" proscription on discussion imposed by Beasley was legally justified, he did not cross-except to the ALJ's factual determination as to what Beasley said (which is not surprising given that the ALJ adopted the version of the facts alleged by the General Counsel). Thus, the ALJ's findings of fact as to what Beasley said during the phone call were the subject of neither exceptions nor cross-exceptions. They therefore may not be challenged. 29 CFR § 102.46(a)(1)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived."); 29 CFR § 102.46(f) ("Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding."); see also *Minteq International, Inc.*, 364 NLRB No. 63, slip op. at 1 fn. 1 (2016) enfd. 855 F.3d 329 (D.C. Cir. 2017) (declining to address an asserted defect in the administrative law judge's decision first raised by respondent in its answering brief to the General Counsel's exceptions); *Manno Electric, Inc.*, 321 NLRB 278, 278 fn. 10 (1996) enfd. per curiam 127 F.3d 34 (5th Cir. 1997) (same for a defect first raised in answering brief to cross-exceptions). Respondent's attempt to dispute the ALJ's findings for the first time in its answering brief runs afoul of the Board's Rules and Regulations.

Even if Respondent had raised its challenge in timely fashion, that challenge would have failed. The only evidence as to what occurred during Beasley's disciplinary interview of Peters is the testimony of Peters and Beasley. Therefore, to adopt Respondent's version of events, the Board would have to reverse the ALJ's decision to credit Peters and discredit Beasley. The Board does not overturn an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that those resolutions are

incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Respondent cites no evidence to support its contention that the ALJ erroneously credited Peters over Beasley (Ans. Br. at 2-3), let alone evidence adequate to overcome the Board's deference when it comes to credibility resolutions. Therefore, even if Respondent's challenge to the ALJ's findings of fact were eligible for consideration, it would fail.

B. Respondent Misstates the Legal Standard for Evaluating Restrictions on Discussing Disciplinary Investigations

1. An Individualized Restriction on an Employee's Ability to Discuss a Disciplinary Investigation Can Violate the Act

Respondent misstates the Board's standard for evaluating the legality of an employer's restriction on an employee's ability to discuss a disciplinary investigation. Specifically, Respondent asserts that the Act prohibits "a blanket rule" requiring confidentiality, that the evidence does not establish that Respondent had "a blanket rule" but instead only shows that it imposed confidentiality on Peters, and that such an individualized imposition does not violate the Act (Ans. Br. at 3-4). The Board has rejected this argument on multiple occasions.

For instance, in *American Federation of State County 5 MI Loc Michigan State Employees Association (MSEA)*, the employer argued that the Board "had found unlawful *blanket* rules prohibiting disclosure in a wide range of circumstances" but "that the prohibition at issue [in *MSEA*] was not such a blanket prohibition" and instead was "directed at a specific employee who was under investigation." 364 NLRB No. 65, slip op. at 17 (2016) (emphasis in original). In concluding that the employer's prohibition violated the Act notwithstanding that it was issued to a single employee, the Board explained that "the central point" is that an employer has a "duty to justify its effort to prohibit communication which otherwise would be protected" by proving the existence of "extraordinary circumstances." Ibid. True, "[a]s a result of this

reasoning, blanket prohibitions must necessarily be unlawful, because they apply to all situations, the ordinary as well as the extraordinary." Ibid. But individualized restrictions still "prohibit communication which otherwise would be protected," and therefore an employer still must justify them by demonstrating "extraordinary circumstances." Ibid.; accord *Dish Network*, 365 NLRB No. 47, slip op. at 3 fn. 8 (2017) (Board evaluates the lawfulness of an employer's confidentiality instruction issued to single employee using the same framework as it does for a general confidentiality rule); *Inova Health System*, 360 NLRB 1223, 1228 (2014), enfd. 795 F.3d 68 (D.C. Cir. 2015) ("We recognize that the Respondent's instruction to [the employee] not to discuss her suspension does not constitute a confidentiality 'rule'…Nonetheless, the same balancing of employer business justification against employee rights in evaluating the lawfulness of a confidentiality rule likewise applies to determine whether a confidentiality instruction issued to a single employee violates the Act."). In summary, "showing that a particular prohibition is not a blanket rule does not carry an employer's burden of establishing extraordinary circumstances" that justify the infringement on the employee's Section 7 rights. *MSEA*, above, slip op. at 17.

Explained differently, the existence of a blanket rule prohibiting discussion of disciplinary investigations is *sufficient* to establish a violation of Section 8(a)(1). Such a rule by definition interferes with protected discussions even where there are no extraordinary circumstances to justify the interference. However, the existence of a blanket rule is not *necessary* to establish a violation. An individualized restriction also interferes with an employee's right to discuss investigations, and, absent adequate justification, this interference violates the Act.

2. Respondent Threatened Peters with Discipline if He Discussed the Disciplinary Interview with Anyone

Respondent also contends that "[t]here is no evidence that…Beasley suggested that there was any disciplinary consequence if employees did not keep the investigation confidential" and that this renders Beasley's action lawful (Ans. Br. at 3). Initially, Respondent is incorrect as an evidentiary matter. According to Peters's credited testimony, Beasley told Peters he was "absolutely forbidden to discuss any of this conversation with anyone" (ALJD at 6; Tr. at 167). Any reasonable employee would take from this that Respondent would discipline him if he discussed the interview. See *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 5 (2015) enfd. in part and remanded 851 F.3d 35 (D.C. Cir. 2017) (Board considered confidentiality instruction to threaten discipline because "from an employee's standpoint" it could "reasonably be read" to do so). Put simply, a manager's instruction to an employee that particular conduct is absolutely forbidden carries the unmistakable implication that there will be disciplinary consequences if the employee engages in that conduct.

In any event, even if Beasley had not threatened Peters with discipline if he discussed the interview and had merely requested that he not discuss it, her actions still would have violated the Act. An employer violates Section 8(a)(1) when it requests that an employee not discuss discipline or a disciplinary investigation with others because such requests have a "reasonable tendency to inhibit protected activity." *The Boeing Company*, 362 NLRB No. 195, slip op. at 3 (2015) (citing *Heck's, Inc.*, 293 NLRB 1111, 1114, 1119 (1989) (instruction to employees that the "company requests you regard your wage as confidential" violated the Act) and *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992) enfd. 987 F.2d 1376 (8th Cir. 1993) (instruction to employees that "[y]our salary…is confidential, and shouldn't be discussed with anyone" violated the Act)); see also *Banner Estrella*, above, slip op. at 5, 5 fn. 14 (finding irrelevant whether the

employer's request that employees not discuss an investigation was accompanied by threat of discipline or merely "suggestive" in nature).

3. Respondent's Restriction on Peters's Ability to Discuss the Disciplinary Interview Was Unlimited in Duration

Respondent makes the additional claim that "[t]here is no evidence that…the request could be viewed to extend beyond the completion of the investigation" (Ans. Br. at 3). This is also incorrect. According to the credited testimony of Peters, Beasley prohibited him from discussing the disciplinary interview with any other person without any limitation as to the prohibition's duration (ALJD at 6; Tr. at 167). A reasonable employee would therefore understand the prohibition as continuing indefinitely. See *Banner Estrella*, above, slip op. at 5.

Regardless, even if Beasley had limited her directive to the investigation's pendency, the directive still would have violated the Act. The Board has rejected the argument that a prohibition on discussion of a disciplinary investigation is lawful if it "applie[s] only while an investigation [i]s ongoing," explaining:

> The investigative period—before the Respondent has reached any conclusions—would seem to be the period when employees likely would be most interested in, and most likely to benefit from, discussion with their coworkers and union representatives.

Banner Estrella, above, slip op. at 5. In other words, a restriction on an employee's right to discuss a disciplinary investigation only while the investigation is ongoing violates the Act because this is the period when that right is most significant.

4. Respondent's Conduct Was Unlawful Even According to the Dissenting Opinion in *Banner Estrella*

In the alternative, Respondent argues that *Banner Estrella*, above, should be overturned in favor of the interpretation of the Act espoused by then-Member Miscimarra in his dissent in that case, id., slip op. at 7-21, the reasoning of which Respondent "incorporates…by reference"

in its brief (Ans. Br. at 4). However, such a change would not affect the outcome of the present case, because even under now-Chairman Miscimarra's view, Respondent's actions violated the Act.

In *MSEA*, the employer required an employee under disciplinary investigation to complete an investigatory questionnaire containing the instruction that the questionnaire's "contents shall remain confidential and is not to be discussed outside union representation." 364 NLRB No. 65, slip op. at 16-17. The only evidence the employer presented to justify this restriction was testimony of its President, who stated that "[t]he purpose [of the restriction] was to assure that there was an open dialogue to protect the integrity of the investigation." Id., slip op. at 18.

Then-Member Miscimarra "concur[red] in finding that the Respondent violated Sec. 8(a)(1) when it required [the employee] to complete the investigatory questionnaire." Id., slip op. at 2 fn. 6. As the concurrence explained:

> On the one hand, the questionnaire…required [the employee], on pain of discharge, to keep the contents of the questionnaire confidential, a requirement that had a substantial impact on the exercise of Sec. 7 rights. On the other hand, testimony regarding the business ends served by the confidentiality requirement—[employer] President Moore's testimony that it was necessary "to protect the integrity of the investigation"—lacked particularity and was unsupported by other evidence. Balancing the respective rights and interests, Member Miscimarra finds that the Respondent has not established an interest justifying its nondisclosure requirement that outweighs the impact of that requirement on the exercise of Sec. 7 rights. See *Banner Estrella*[, above, slip op. at 7-21] (Member Miscimarra, dissenting in part).

Ibid.

Here, as in *MSEA*, "[o]n the one hand," Respondent forbade an employee under disciplinary investigation from discussing the contents of an interrogation that was part of that investigation (ALJD at 6; Tr. at 167), thereby having a "substantial impact on the exercise of

Sec. 7 rights." Ibid. Also as in *MSEA*, "[o]n the other hand, testimony regarding the business ends served by the confidentiality requirement…lacked particularity and was unsupported by other evidence." Ibid. Indeed, the *only* evidence regarding why the restriction on Peters was necessary was Beasley's testimony that she imposed it "[f]or the integrity of the investigation" (Tr. at 581). Beasley's testimony bears a remarkable similarity to the employer's President's testimony in *MSEA* that the confidentiality restriction was necessary "to protect the integrity of the investigation," which testimony the concurrence found inadequate to justify the imposition on Section 7 rights. Ibid. Thus, as was true for the employer in *MSEA*, Respondent's actions violate the Act even under the interpretation espoused in the *Banner Estrella* dissent.

II. Respondent's Interrogation of Employees in Early September 2014

The General Counsel filed a cross-exception to the ALJ's failure to conclude that Terminal Manager Brian Spiller unlawfully interrogated employees in early September 2014. In answer, Respondent contends that "[n]o further remedy would be granted by making specific determinations" as to the interrogation allegation (Ans. Br. at 5, 8-9). This is not correct. The ALJ's recommended order does not currently require Respondent to cease and desist from coercively interrogating employees about their union or other protected concerted activities (ALJD at 19-20). Relatedly, the ALJ's recommended Notice to Employees does not assure employees that Respondent will not interrogate them about their union or other protected concerted activities (ALJD, Appendix). Therefore, contrary to Respondent's contention, were the Board to conclude that Spiller unlawfully interrogated employees in early September 2014, additional remedies would be warranted.

In the alternative, Respondent argues that Spiller's interaction with employees in early September 2014 was not an unlawful interrogation (Ans. Br. at 6-8). Respondent states that

"Spiller was aware that Peters and [employee Dennis] Roscoe were involved in organizing" and argues that because Peters and Roscoe were "open and active union supporters" Spiller's questioning of them was lawful (Ans. Br. at 6-7). The trouble with Respondent's argument is that Peters and Roscoe were not the subjects of the interrogation in question. Rather, the ALJ's factual findings establish that Spiller interrogated employees Matthew Horne, Marcell Salmond, and Greg Baranyay (Tr. at 75-76). There is no evidence that Horne, Salmond, or Baranyay were open and active union supporters. Therefore, Respondent's argument is inapposite.

III. Remedy for Respondent's Unlawful Discipline of Roscoe on October 2, 2014

Respondent states that it understands the ALJ's recommended order as requiring it to rescind the Final Warning and placement on a Performance Improvement Plan that it imposed on Roscoe at the same time it suspended him for two weeks on October 2, 2014 (Ans. Br. at 8). Nevertheless, the General Counsel reiterates his request that the Board clarify the order to make this requirement explicit, which will eliminate any risk of controversy as to the order's scope.

IV. Conclusion

For the foregoing reasons, the General Counsel requests that the Board reject the arguments raised against his cross-exceptions in Respondent's answering brief.

Respectfully submitted,

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